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Supreme Court of the United States.

OCTOBER TERM, 1969.

No. 1251.

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, INC., ET AL.,
Petitioners,
v.
REDERIAKTIEBOLAGET TRANSATLANTIC,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the Court of Appeals for the First Circuit is reported in 420 F. 2d 419. The opinion of the United States District Court for the District of Massachusetts is not officially reported. The opinion of the Federal Maritime Commission is reported in 10 F.M.C. 409.

Jurisdiction of this Court.

The judgment of the Court of Appeals for the First Circuit was entered on January 8, 1970 (A. vol. I, p. 52). The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1964). The petition for certiorari was filed in this Court on February 27, 1970, and certiorari was granted April 20, 1970 (A. vol. I, p. 53).

Provisions of Statutes.

46 U.S.C. § 814 (vol. 10, 1964 ed., pp. 8814-8815).

§ 814. *Contracts between carriers filed with Commission; definition of "agreement"; approval, disapproval, etc. by Commission; unlawful execution of agreements; conference agreements and antitrust laws exemptions; civil actions for penalties; terminal leases exemption.*

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character or freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after dis-

approval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1–11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action: *Provided, however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly ap-

prove, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section. (As amended Oct. 3, 1961, Pub. L. 87-346, § 2, 75 Stat. 763; Feb. 29, 1964, Pub. L. 88-275, 78 Stat. 148.)

U.S.C. TITLE 28 (1964 ed., Supp. III, vol. 1, pp. 1539-1540).

§2341. *Definitions.*

As used in this chapter—

(1) "clerk" means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed;

(2) "petitioner" means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed; and

(3) "agency" means—

(A) the Commission, when the order sought to be reviewed was entered by the Federal Communications Commission, the Federal Maritime Commission, or the Atomic Energy Commission, as the case may be;

(B) the Secretary, when the order was entered by the Secretary of Agriculture; and

(C) the Administration, when the order was entered by the Maritime Administration. (Added by Pub. L. 89–554, § 4(e), Sept. 6, 1966, 80 Stat. 622.)

§2342. *Jurisdiction of court of appeals.*

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) such final orders of the Federal Maritime Commission or the Maritime Administration entered under chap-

ters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46; and

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title. (Added by Pub. L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 622.)

§ 2343. *Venue.*

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit. (Added by Pub. L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 622.)

§ 2344. *Review of orders; time; notice; contents of petition; service.*

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt. (Added by Pub. L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 622.)

Statement of the Case and Proceedings Below.

The Procedural Narrative.

a. *Summary.*

This case began in the Massachusetts Superior Court in 1965.* The defendants removed it to the United States District Court for the District of Massachusetts. While the case was pending there, the trial judge permitted the defendants to petition the Federal Maritime Commission for determination of the issues. The Commission in 1967 ruled for the plaintiffs. The defendants appealed that ruling to the Court of Appeals for the District of Columbia Circuit which, in 1968, rejected the appeal for lateness. The case was then resumed before the district judge, who permitted Rederiaktiebolaget Transatlantic to intervene as a defendant. The District Court found for the plaintiffs in 1969. All the defendants acquiesced in that ruling, except Rederiaktiebolaget Transatlantic which appealed from the District Court judgment to the Court of Appeals for the First Circuit. That Court on January 8, 1970, reversed the District Court's judgment, and the case is here on a writ of certiorari to the Court of Appeals for the First Circuit pursuant to plaintiffs' petition.

b. *The Parties and the Issue.*

The plaintiffs are the Port of Boston Marine Terminal Association (PBMTA) and its members: The Massachusetts Port Authority, Mystic Terminal Co., Port Terminals, Inc., Wiggin Terminals, Inc., and the New York Central Railroad (now the Penn Central Co.) (A. vol. I, p. 9). In this brief, PBMTA and its constituent members will be referred to, where appropriate, as "Terminals."

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* Record references and more particular dates are contained in parts b through h below, which this paragraph merely summarizes.

Originally, the defendants were the Boston Shipping Association and its members, thirteen corporations and partnerships representing the interests of vessels and stevedores using the terminal facilities of the Port of Boston (A. vol. I, pp. 9-11). This brief will refer to those defendants collectively as "Shipping."

The tariff of Terminals is issued under Federal Maritime Commission Agreement No. 8785 (A. vol. II, p. 5), a conference agreement approved by the F.M.C. (A. vol. I, p. 21). Prior to 1965, Terminals' tariff provided that charges for demurrage or storage of cargo during longshoremen's and clerks' strikes, as at other times, would fall on those parties claiming an interest in the cargo, *e.g.*, consignees. Longshoremen and clerks are employed by vessels and vessel interests, however, who still have custody and control of the cargo during such strikes. Terminals decided, in 1964 and 1965, to shift the incidence of that charge from cargo interests to the vessel delivering the cargo.

Shipping contended that this shift in the incidence of strike storage charges was unlawful under the Shipping Act, 1916 (46 U.S.C. sec. 801 *et seq.*).

c. *The Court Action.*

Terminals, in 1965, brought a petition against Shipping for declaratory relief and damages in the Superior Court of the Commonwealth of Massachusetts for Suffolk County (A. vol. I, p. 9). The suit sought, first, a declaration of the validity of the tariff change affecting strike storage charges, and, secondly, an order requiring the defendants to pay the charges.

On September 1, 1965, Shipping removed the action to the United States District Court for the District of Massachusetts (A. vol. I, p. 13) and filed its answer (A. vol. I,

p. 15). Shipping invoked the District Court's jurisdiction under 28 U.S.C. § 1441 (b) (1964) relative to actions alleging a claim under the laws of the United States (A. vol. I, p. 14).* Shipping's answer denied the legality of the tariff change and alleged that Terminals had failed to comply with the Shipping Act, 1916 (A. vol. I, pp. 16-17).

On January 13, 1966, Terminals moved that the District Court either order the simplification of issues or grant summary judgment for Terminals (A. vol. I, p. 18). The motion suggested that the simplifying order take the form of a permission for Shipping to proceed before the F.M.C. for review of the tariff change. If Shipping did not so proceed, the motion proposed that the Court then consider the tariff change valid for the purpose of the litigation (A. vol. I, p. 18).

On March 11, 1966, the Court, stating that the F.M.C. had primary jurisdiction to determine the lawfulness and reasonableness of the tariff change, ordered that litigation be stayed so as to allow Shipping to secure an F.M.C. rul-

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* While it may be that no one will challenge the District Court's removal jurisdiction under 28 U.S.C. § 1441 (b), this Court may of course question it upon its own motion. The District Court dealt with the problem of jurisdiction at A. vol. I, p. 40, and the Court of Appeals at A. vol. I, pp. 48-49. It is submitted that the authorities there cited sufficiently support the conclusion of the Courts below. Original jurisdiction would have existed under 28 U.S.C. § 1337. See American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts, Tentative Draft No. 3, pp. 29-30, to the effect that suits for collection or refund of freight charges, demurrage, and the like lie under section 1337 irrespective of the amount involved; it is there noted, *inter alia*, that "These rate disputes do have far reaching implications, and decision of them requires application of a distinctly federal body of materials." See, in addition to the cases cited by the Courts below, *Louisville & Nashville Railroad Co.* v. *Rice*, 247 U.S. 201, 203 (1918); and *Atchison, T. & S. F. Ry. Co.* v. *Springer*, 172 F. 2d 346, 349 (7th Cir. 1949), the latter case involving demurrage charges under an I.C.C. tariff, as did *Turner, Dennis & Lowry Lumber Co.* v. *Chicago, Milwaukee & St. Paul Railway Co.*, 271 U.S. 259, 261, 262 (1926), cited by the Court of Appeals.

ing on the issue. The parties, within 60 days, were to report what action was taken pursuant to the order. The Court retained jurisdiction (A. vol. I, pp. 23-24) and the parties subsequently reported that Shipping had begun F.M.C. proceedings (A. vol. I, p. 24).*

d. *Before the Federal Maritime Commission.*

On April 21, 1966, Shipping filed a complaint with the F.M.C. challenging the lawfulness and reasonableness of the tariff charge in question. The complaint bore the docket number 66-28 (A. vol. I, p. 24).

After a hearing before a trial examiner, the Commission considered the matter on Terminals' exceptions to the examiner's rulings. The Commission issued its final report and order on June 28, 1967, which was reported in *Boston Shipping Association, Inc.* v. *Port of Boston,* 10 F.M.C. 409 (1967) (A. vol. II, p. 49). The F.M.C. held (1) that § 17, Shipping Act, 1916, governs the assessment of strike storage charges for cargo on Boston piers during longshoremen's strikes; (2) that shifting the charge from cargo interests to the vessel did not require prior approval by the F.M.C. under § 15 of the Act; and (3) that assessment of the charge against the vessel for cargo which was still in free time (that is, five days following discharge from the vessel) when the strike began, was neither a prohibited practice under § 17, nor a prejudicial action under § 16 of the Act.

e. *Shipping's Appeal from the F.M.C. Decision.*

On September 19, 1967, Shipping appealed the F.M.C. decision by way of a petition for review filed in the Court of Appeals for the District of Columbia Circuit (A. vol. I,

* Subsequently, the Court added to its order a provision reserving to the parties their appropriate rights of appeal from an F.M.C. decision (A. vol. I, p. 25).

p. 67). On March 18, 1968, the Court of Appeals dismissed the petition for lateness (A. vol. II, p. 67). Shipping sought a rehearing, but the Court denied it (A. vol. II, p. 68).

f. *Transatlantic's Petition for Reconsideration.*

On March 6, 1968, the United States Supreme Court decided *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission*, 390 U.S. 261 (the *"VW"* case). Six months later, on September 4, 1968, long after the Court of Appeals for the District of Columbia Circuit had denied Shipping's appeal from the F.M.C. decision, Rederiaktiebolaget Transatlantic ("Transatlantic"), a Swedish shipping company theretofore represented by Furness, Withy & Co., a member of Shipping, petitioned the F.M.C. to reconsider its decision because of the supposed effect of the *VW* case upon that decision (A. vol. II, p. 69). The F.M.C. declined to accept the petition for reconsideration because it was not filed within the time provided by its Rules for such petitions (A. vol. II, p. 77). See F.M.C. Rule 16 (a), 46 C.F.R. § 502.261 (1970). Transatlantic sought no review of the F.M.C.'s refusal to accept the petition.

g. *Further Proceedings in the United States District Court for the District of Massachusetts.*

The District Court had held that the F.M.C. had primary jurisdiction of the issues in the case. Shipping, accordingly, had sought an F.M.C. ruling which decided the issues adversely to it. The administrative appeal procedures were over. The case was now ripe for a decision by the United States District Court for the District of Massachusetts.

Before the trial began, however, Transatlantic filed a petition to intervene and the Court allowed it (A. vol. I, p. 26). The Court then heard the case on two stipulations of fact. The first stipulation bound Terminals and Shipping alone. It contained the F.M.C. trial examiner's decision and that of the full Commission (A. vol. I, p. 33). It provided that the facts found in those decisions were true (A. vol. I, p. 33); the second stipulation (A. vol. I, p. 35) bound Terminals, Shipping and Transatlantic. It was substantially similar to the first stipulation, but did not contain the provision as to the truth of the facts found by the F.M.C. Transatlantic, however, introduced no evidence contradicting the truth of those facts, so the substantive effect of the second stipulation is the same as that of the first.

On April 27, 1969, the District Court (Wyzanski, C.J.) ruled as follows:

1.) The F.M.C. had primary jurisdiction of the subject matter of the dispute;

2.) the District Court was not the appropriate tribunal to review the F.M.C. decision;

3.) even if the Court were to review the F.M.C. decision, it could set that decision aside only if it lacked a substantial evidentiary basis or was contrary to the Constitution or the statute law;

4.) the F.M.C. decision reflected an expertise developed in its administration of its statute, and indeed comported with the Court's own construction of the statute (A. vol. I, pp. 40-43).

On May 2, 1969, the District Court entered a judgment declaring the validity of the tariff change and ordering the defendants to pay the balance due from each on account of the strike storage charges (A. vol. I, pp. 43-44).

All of the defendants except Transatlantic, the intervener, acquiesced in the District Court judgment. Trans-

atlantic, however, appealed from the judgment to the Court of Appeals for the First Circuit (A. vol. I, p. 45).

h. *To the Court of Appeals for the First Circuit.*

The Court of Appeals heard Transatlantic's appeal on October 8, 1969. Thereafter, on January 8, 1970, the Court of Appeals filed its decision and judgment (A. vol. I, pp. 46-52). The Court reversed the judgment entered by the District Court and found that the *VW* case (390 U.S. 261) required specific F.M.C. approval of the change in incidence of the tariff charge. Terminals challenged the Court of Appeals' decision and, on February 27, 1970, filed with this Court a petition for a writ of certiorari. Certiorari was granted April 20, 1970 (A. vol. I, p. 53).

THE SUBSTANTIVE NATURE OF THE PROBLEM.

PBMTA operates under F.M.C. Agreement No. 8785, a conference arrangement approved by the Commission (A. vol. II, p. 5). The terms of Agreement No. 8785 authorize the fixing of rates and charges for wharfage, dockage, free time, wharf demurrage, usage charges and services and facilities incidental thereto, and require the filing of pertinent tariffs with the Commission. PBMTA's members were the Massachusetts Port Authority, the New York Central System, the Mystic Terminal Company, Port Terminals, Inc., and Wiggin Terminals, Inc., all as operators of terminals in the Port of Boston. None of these operators of terminals is a carrier.

Agreement No. 8785 recites that it is an agreement entered into under § 15 of the Shipping Act, 1916, "by and among the Marine Terminal Operators of the Port of Boston, Massachusetts relative to rates of and charges by the parties for furnishing wharfage, dock, and other ter-

minal facilities in the Port of Boston in connection with common carriers by water as defined in the Shipping Act" (A. vol. II, p. 5). The Agreement further states that it supersedes a "previous memorandum of cooperative working arrangement by and among the parties (F.M.C. No. 8365)."

By the Agreement the parties associated themselves into the Port of Boston Marine Terminal Association, each representing that it was an owner or an operator of a marine terminal at Boston and that it furnished "wharfage, dock, or other terminal facilities in connection with common carriers by water at the Port of Boston" (A. vol. II, pp. 5-6). Under Article Second of the Agreement, the Agreement and any amendments were subject to the approval of the Agency (*i.e.*, the Commission). (For the Commission's approval of the Agreement, see A. vol. I, p. 21.)

The Agreement further sets forth in Article Third that "This agreement shall cover the following subject matters and all services, facilities, rates, and charges incidental thereto:—wharfage, dockage, free time, wharf demurrage, usage charges, passenger charges, water, electricity."

Methods of holding meetings and electing officers are set forth in Articles Fourth and Fifth (A. vol. II, pp. 6-7).

In Article Sixth the parties agree that "their respective tariffs, rates, charges, classifications, rules and regulations, and additions thereto and changes therein, adopted pursuant to this agreement and covering the subject matter referred to in Article Third shall be filed promptly with the Agency. They further agree that no changes in said tariffs, rates, charges, classifications, and rules and regulations shall be made without prior notice of such changes to members of the Association, who shall be afforded an opportunity for consultation and for the making of such exceptions as they may desire in the tariff rates, charges, classifications, and rules and regulations, with the under-

standing that the party proposing a change reserves the right to make it effective at its own wharves or piers regardless of the action of the other parties hereto, but not earlier than forty days after notice of the prior notice hereinabove referred to" (A. vol. II, pp. 7-8). Article Sixth also provides for public notice prior to tariff changes. The remaining articles concern themselves with adherence to the rates and tariffs to be published by PBMTA (Seventh) (A. vol. II, p. 8), applications for membership (Eighth) (A. vol. II, pp. 8-9), prorating of expenses (Ninth) (A. vol. II, p. 9), withdrawals (Tenth) (A. vol. II, p. 9), and miscellaneous matters (Eleventh through Fifteenth) (A. vol. II, pp. 9-10).

PBMTA's tariff assessed dockage against the vessel on general cargo at 20¢ per ton (A. vol. II, p. 37). Wharf demurrage was assessed against cargo interests at 2½¢ per 100 pounds per day (A. vol. II, p. 40). Dockage is defined by the tariff as the charge assessed for the service of providing space alongside the wharf or pier for the docking or berthing of watercraft or the mooring of watercraft (A. vol. II, p. 17), while wharf demurrage is a charge assessed against cargo after the expiration of the period commonly known as free time (A. vol. II, p. 19). Free time is defined as the period in which cargo is allowed to remain on a pier free of charge prior to loading of a vessel or after discharge from a vessel (A. vol. II, p. 17). The tariff provided (and still provides) for a free time of five days on import cargo and seven days on export cargo (A. vol. II, p. 32). No issue was presented to the Commission as to the reasonableness of these free-time allowances (A. vol. II, p. 52). PBMTA's tariff also provided a $1.75 per ton wharfage charge assessable to the cargo (A. vol. II, p. 38). This was the charge for the use of the pier or wharf.

The practice in the Port of Boston is that, on inbound shipments, the vessel sends an arrival notice to the consignee, who usually receives it the morning the vessel docks, but never later than the completion of discharge (A. vol. II, p. 53). The major portion of the cargo is picked up by the consignee during free time (*ibid.*). The usual procedure is for a truckman or a railroad freight handler on the consignee's behalf to arrive at the pier with an order for the cargo; the cargo is tallied by a tally clerk, an employee of the vessel; while being tallied, the cargo is loaded by the consignee's representatives, one of whom signs the tally proffered by the tally clerk; and, lastly, a second or delivery clerk enters the data in a "delivery book," at which time the truckman or handler signs against the receipt of the delivery of the cargo (*ibid.*).

Ocean freight rates on general cargo into the Port of Boston cover transportation from a place of rest to a place of rest which is generally inside the pier shed to which the cargo is removed from discharge from the vessel (A. vol. II, p. 52). It is the vessel's obligation to move the cargo to the place of rest (*ibid.*). Stevedoring companies, under contract with the vessel, perform this service with longshoremen. The latter are members of longshoremen's locals of the International Longshoremen's Association (*ibid.*). During strikes by these longshoremen's locals, trucking and railroad employees observed the picket line and did not pick up cargo (A. vol. II, p. 55). The Boston Shipping Association also negotiates with respect to Local 1066 of the International Longshoremen's Association, of which the members are the clerks (A. vol. II, p. 52). Tally clerks and other clerks of B.S.A. go on strike at the same time as the longshoremen's locals (A. vol. II, p. 54).

Under the tariff prevailing under Agreement No. 8785 prior to the change, when cargo was " 'prevented from removal by factors beyond the consignees' control such as

strikes, weather conditions, or similar situations affecting the entire Port area,'" wharf demurrage was assessed on cargo at a reduced rate of 1¢ per 100 pounds per day (*i.e.*, reduced from 2½¢), but continued to be assessed against the cargo (A. vol. II, p. 52).

PBMTA recognized a problem in assessing wharf demurrage during strikes against the consignees on receiving a letter from one of its members, the Massachusetts Port Authority, on August 5, 1964. The author of the letter, Joseph J. Connolly, the pier superintendent of the Port Authority, stated: "Over the years terminal operators and the Port of Boston have been severely criticized by consignees of import cargo or the shippers of export cargo when wharf demurrage charges are assessed during strike periods. Many times it seems almost useless to advise them that a reduction in charges is established for that purpose.

"I am of the opinion we should establish a more compatible understanding with customers of Boston and assess a charge against the vessel. Consignees, in most instances, are desirous of taking custody of their cargo as quickly as possible and we all know the turmoil that exists on the piers if a 'strike is imminent' " (A. vol. I, p. 22).

The members of PBMTA subsequently determined upon a change in the manner and rate of charging wharf demurrage during longshoremen's and clerks' strikes. The charge is now made against the vessel rather than the cargo, and the rate is reduced to ½¢ per 100 pounds per day (A. vol. II, p. 54). This charge applies when the removal of cargo is prevented by strike of the "vessel's employees, or employees of the agent of the vessel, or firms employed by either the agent or the vessel" (A. vol. II, p. 46). No charge is made when removal of cargo is prevented by a strike of the terminal employees (*ibid.*). The consignee in any case would be entitled under this tariff to a full five days' free time.

How the Commission Dealt with this Problem.

The Commission in its report discussed at length the effect of the free-time clause on the duties of the carrier and the terminal. It pointed out that the obligation of the vessel is to make sure that the consignee has a reasonable opportunity to pick up his cargo, and that the purpose of free time is to make the opportunity a matter of tariff obligation (A. vol. II, pp. 60-62).

The Commission observed: "Once free time has expired, the vessel's transportation obligation has ended" (A. vol. II, p. 62). For this reason, the Commission concluded "that as to cargo which is in demurrage when the strike begins, it is an unjust and unreasonable practice within the meaning of section 17 to assess strike storage against the vessel" (A. vol. II, p. 62).

As to cargo which was still on free time at the commencement of a strike, the Commission held that it was not unreasonable to charge the vessel, because it is still "the vessel which has yet to discharge its full obligation to tender for delivery and it is to the vessel that the terminal is at this point in time supplying the attendant facilities and services" (A. vol. II, p. 61).

The Commission observed, on the section 15 issue that

> "The present charge is in effect this same wharf demurrage though now called strike storage. Thus, the only real change effected by the controversial provision is the shift of the charge from cargo to vessel.
>
> "Approval of Agreement No. 8785, the basic agreement under which the terminals operate, assumed that the various costs of providing terminal services would be allocated as between users of those services" (A. vol. II, p. 56).

Summary of Argument.

I. The respondent, Transatlantic, seeks to reverse the F.M.C determination that the shift in incidence of strike storage charges from cargo to vessel was not a modification of Agreement No. 8785 requiring approval by the F.M.C. under § 15 of the Shipping Act, 1916.

Settled principles of administrative and judicial procedure preclude the maintenance of Transatlantic's position.

A.) The agency's decision was a final order reviewable solely by a petition for review to the Circuit Court of Appeals. The defendants Shipping, among whom Transatlantic was represented by a member, applied for such review, and it was denied because of lateness. Transatlantic waited until six months had passed after entry of the final judgment of the Court of Appeals for the District of Columbia Circuit before seeking, in its own name, to reopen the F.M.C. proceedings. The Commission rejected Transatlantic's petition, but Transatlantic sought no review of the rejection. Both Shipping and Transatlantic failed to exhaust administrative remedies. This failure bars review of the F.M.C. decision, and the Circuit Court of Appeals for the First Circuit erred in ruling otherwise. (Pages 22-25.)

B.) Transatlantic was represented before the F.M.C. at all relevant times. Its presence there renders it a party to the agency decision, bound by the terms of the order and subject to the statutory limits of review. An attempt to transcend the order or enlarge the manner of review violates the principle of collateral estoppel. The Court of Appeals for the First Circuit erred in not properly applying that principle. (Pages 25-28.)

C.) As the District Court ruled, the F.M.C. has primary jurisdiction to determine the validity of the shift in incidence of strike storage charges from cargo to vessel. The

Court of Appeals for the First Circuit seriously undermined the concept of primary jurisdiction by failing to grant any credit to the agency decision, which was based on the agency's practical experience interpreting agreements subject to its approval, and on its long-standing and court-approved construction of the relevant statutes. The Court of Appeals' refusal to apply the doctrine of primary jurisdiction was reversible error. (Pages 28-29.)

II. Apart from the question of jurisdiction, the Court of Appeals for the First Circuit failed to accord the F.M.C. decision that respect and deference to which, as the United States Supreme Court has ruled, such decisions are entitled. The Court of Appeals erred in so discounting the F.M.C. decision. (Pages 30-33.)

III. As a matter of substantive law, the shift in PBMTA's tariff in incidence of strike storage charges from cargo to vessel was well within the bounds of activity permitted by Agreement No. 8785 which had been approved by the F.M.C. The Court of Appeals erred in deciding that the F.M.C. had to give separate approval to a tariff shift in incidence of strike storage charges.

A.) The Court of Appeals applied the *VW* case to the circumstances of this case. The *VW* case, however, concerned a completely new and hitherto unapproved agreement to raise a fund to minimize the effect of technological unemployment. There was no conference agreement. The case raised no question as to whether the new agreement for the assessment of charges fell within a prior approved agreement. In the present case, to the contrary, the issue precisely raised is whether the shift in incidence of strike storage charges was authorized by the terms of Agreement No. 8785. Nothing in *VW* bears on the correctness of the F.M.C.'s decision in a case, such as this, where an existing conference agreement is being interpreted. (Pages 33-34.)

B.) In addition to denying the F.M.C. any deference with respect to its determination of the law, the Court of Appeals discountenanced the F.M.C.'s traditional view that changes in terminal charges under a tariff are permissible under approved conference agreements. (Pages 34-41.)

C.) In ruling that the tariff modification at issue here required separate F.M.C. approval, the Court of Appeals ignored the administrative standards developed on a case-by-case basis by the agency and by the courts for the purpose of determining what modifications of tariffs amount to such substantial changes as to require separate approval. Application of those standards to the change at issue here inescapably leads to the conclusion that the F.M.C. and the District Court were correct in their judgments and that the Court of Appeals erred in reversing those judgments. The terms of Agreement No. 8785 do not themselves specify the incidence of any charges, and therefore a shift in the incidence of a tariff charge can hardly represent a "modification" of Agreement No. 8785. (Pages 41-46.)

Argument.

I. The Commission having Determined that a Change in Incidence of Certain Charges under Agreement No. 8785 was Not a Modification Requiring Further § 15 Approval, that Determination Could Not be Collaterally Attacked.

Although such doctrines as exhaustion of remedies, administrative *res judicata*, and primary jurisdiction should not be applied where the administrative remedy is inadequate, *Greene* v. *United States*, 376 U.S. 149, 163 (1964), the remedy provided by § 22 of the Shipping Act, 1916, 46 U.S.C. § 821, the provision for intervention in Rule 5(1) of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.72, and the judicial review procedure set

forth in 28 U.S.C. §§ 2341-2344, were and are abundantly adequate. These remedies certainly do not become inadequate because of the expiration of time limitations.*

Often it is vitally important to have matters finally adjudicated so that the persons involved can proceed to other business.

In the case at bar, the decision of the Commission was issued in June of 1967, about three years ago. Shipping appealed from the decision but the appeal was dismissed, and the decision became final. About six months after the *VW* decision in the Supreme Court and the argument of the present case on review in the Court of Appeals for the District of Columbia, Transatlantic presented its petition for reconsideration to the Commission. The Commission may have had power, if it wished, to entertain such a petition for good cause but did not do so. Shipping Act, 1916, § 25, 46 U.S.C. § 824. Transatlantic failed to pursue the matter further. Since then Boston has experienced a prolonged dockworkers' strike.

The chronology strongly suggests the applicability of all three doctrines of exhaustion of remedies, *res judicata*, and primary jurisdiction. The doctrines are not always susceptible of clear and unambiguous restatement. But the three doctrines together, in the circumstances, point to summary rejection of the defenses asserted by Transatlantic.

A. *Having Failed to Exhaust its Administrative Remedies by Seasonably Intervening before the Commission and*

*Compare *First National Bank of Greeley* v. *Board of County Commissioners of County of Weld*, 264 U.S. 450 (1924), where exhaustion was required although the statutory time on administrative remedies had presumably run by. Accord, *McKart* v. *United States*, 395 U.S. 185, 193-197 (1969) (failure to exhaust remedy in selective service case held not fatal in criminal case).

Appealing, Transatlantic was Barred from Raising the Issues in Question.

The proceedings in the Federal Maritime Commission were open and Transatlantic and Shipping each had methods of obtaining review. The so-called Hobbs Act would have provided the method of review from the Commission's determination in this area if any errors were committed. 28 U.S.C. §§ 2341-2344. The intent of that legislation is to make agency determinations final, subject to judicial review upon the agency record. Frankly, it is difficult to understand any basis for an argument that this Act was not binding on Shipping at least. The Act specifically covers *inter alia* "such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46; . . ." 28 U.S.C. § 2342 (3). Compare *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607 (1966) (reparation case).

Review under this Act was sought by Shipping in the Court of Appeals for the District of Columbia Circuit but was dismissed for lateness (A. vol. II, p. 67). But under § 2342 the Court of Appeals on such a petition has "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" the order being reviewed. That the remedy is exclusive was held in *D. L. Piazza Co.* v. *West Coast Line, Inc.,* 210 F. 2d 947 (2d Cir. 1954), cert. den. 348 U.S. 839.

Transatlantic may contend (as in its Memorandum in this Court opposing issuance of the writ of certiorari, page 4) that the Commission's decision was not a "final order" of the type committed to the exclusive reviewing jurisdiction of the Courts of Appeals under 28 U.S.C. § 2342, and that the Commission's ruling resulted in no determination of or exoneration of liability. Transatlantic has already

thus suggested that the Commission in 10 F.M.C. 409 was dealing with only a few of the issues and could not deal with anything finally.

On the contrary, there is just as much finality in the order of the Commission here involved as there was in *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission,* 390 U.S. 261 (1968). That case was somewhat similar in judicial and procedural structure to the present one in its initial phases. The Pacific Maritime Association sued two marine terminal companies (Terminals) in the California federal court. *VW,* being impleaded, obtained a stay of the action to permit it to invoke the primary jurisdiction of the Commission to determine three issues—whether the assessments were claimed pursuant to an unapproved § 15 agreement; whether *VW* was subjected to unreasonable prejudice or disadvantage under § 16; and whether the assessments constituted an unjust and unreasonable practice under § 17. *VW* filed its complaint with the Commission. The Commission ruled on those three issues, two Commission members dissenting. *Volkswagenwerk Aktiengesellschaft* v. *Marine Terminals Corp.,* 9 F.M.C. 77 (1965). The case was brought to the Court of Appeals for the District of Columbia Circuit on a petition for review. *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission,* 371 F. 2d 747 (D.C. Cir. 1966). This Court granted certiorari to review that Court's determination, 388 U.S. 909 (1967). Apparently no one thought of asserting that the Commission's order was not a "final order" that could not be reviewed. That would have been a rather wild assertion, to put it mildly.

Cases of review in which the issue of finality was argued and resolved adversely to Transatlantic's anticipated contention as to lack of finality include: *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 198-200 (1956) (peti-

tion to review refusal of Federal Communications Commission to amend certain rules); *Frozen Foods Express* v. *United States,* 351 U.S. 40, 43-44 (1956) (determination that certain commodities were not agricultural commodities under the Federal Motor Carrier Act held "final" and hence reviewable even though purely declaratory).

Transatlantic may also advance the argument that no declaratory order is reviewable under 28 U.S.C. §§ 2341-2344. The *Frozen Foods Express* case, just cited, is authority against such a contention. It used to be that a declaratory order was not ripe for review even though a coercive order would be ripe, but the law has been otherwise for many years. 2 Davis, Administrative Law, § 21.07. The test of ripeness should be whether the legal rights and duties of the parties are affected by the order in question. In the present circumstances rights and duties were clearly affected.

The Commission ordered Terminals to "amend their Terminal Tariff No. 1 in a manner not inconsistent with the Commission's decision herein" (A. vol. II, p. 66). Under § 23 (46 U.S.C. § 822) of the Shipping Act, 1916, that order "shall continue in force until" further order of the Commission unless suspended, modified, or set aside by the Commission or "suspended or set aside by a court of competent jurisdiction." That order, it may be assumed, was complied with by Terminals promptly. It would have required something out of the ordinary in foresight for Terminals to say to the Commission, "No, your order is not final." Failure to comply with the Board's order would have rendered Terminals subject to a civil suit for enforcement under § 29 (46 U.S.C. § 828); and criminal penalties under § 32 (46 U.S.C. § 831).

B. *Transatlantic is Barred by Collateral Estoppel from Relitigating the Issues which it Sought to Raise in the*

District Court. Those Issues had been Determined by the Commission, before whom Transatlantic's Interests were Represented.

The Court of Appeals for the First Circuit reasoned that Transatlantic had not been a party to the agency proceedings (A. vol. I, p. 51). But, as is pointed out in 2 Davis, Administrative Law, § 18.05, the determination of whether one was a party in a prior proceeding is not always a purely mechanical matter.

At all material times Furness, Withy & Co., Ltd., was a party to the proceedings represented by counsel for Shipping (A. vol. I, p. 27). It is undisputed that Furness, Withy was the agent of Transatlantic. Transatlantic, in its moving papers seeking intervention in the District Court proceedings, stated *inter alia:* "1. Transatlantic is a common carrier by water operating a steamship business in the foreign commerce of the United States. At all times relevant to the issues involved in this case, Transatlantic was represented at the Port of Boston by its agent, Furness, Withy & Co., Ltd." (A. vol. I, p. 26). Transatlantic then stated—as was the fact—that something more than $8,000 of demurrage charges against Furness, Withy were subject to reimbursement from Transatlantic (A. vol. I, p. 27). Transatlantic then stated that on September 4, 1968, "Transatlantic, which at all times prior thereto had been represented by counsel for Furness, Withy," petitioned the Commission for rehearing (A. vol. I, p. 27).

Subsequent portions of this document make it quite clear that Transatlantic considered Furness, Withy to have been acting for it at all times, both in the practical aspects of the berthing and service of its vessels in the Port of Boston and in the legal proceedings before the Commission. The expressed reason for the intervention by Transatlantic was not that it was a stranger to the proceedings but,

rather, that Transatlantic felt its interests had not been and were not being protected sufficiently by Furness, Withy (A. vol. I, pp. 28-29).

In Restatement: Judgments, § 85 (1), it is stated: "Where a judgment is rendered in an action in which a party thereto properly acts on behalf of another, the other is (a) bound by and entitled to the benefits of the rules of res judicata with reference to such of his interests as at the time are controlled by the party to the action; (b) not bound by or entitled to the benefits of the rules of res judicata with reference to his interests not controlled by the party to the action." The present situation is within the Restatement's rationale.

The applicable standard is not mechanistic. Thus, in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 402 (1940), dealing with the question of privity among government agencies as parties, this Court pointed out, "Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal. As stated in *Chicago, R. I. & P. Ry. Co.* v. *Schendel*, 270 U.S. 611, 620, 'Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different . . . and parties nominally different may be, in legal effect, the same.' " Other cases of a similar tendency are cited in the opinion in *Chicago, R. I. & P. Ry. Co.* v. *Schendel*.

A different approach would lead, as it has in this case, to conflicts between the court and the regulatory agency regarding future conduct. "In cases where an order is directed to future relationships, the decision of that agency which has the major and continuing responsibility should prevail." Jaffe, Judicial Control of Administrative Action, p. 135. Conflicts between courts and administrative agencies would lead to vexatious consequences for the public and for the business interests involved if agency de-

cisions were subject to collateral challenge in the courts and were not given finality, even though precisely the same claims and transactions were involved. The practical basis of the law of *res judicata* is suggested by Restatement: Judgments, § 1:

> "Where a reasonable opportunity has been afforded to the parties to litigate a claim before a court which has jurisdiction over the parties and the cause of action, and the court has finally decided the controversy, the interests of the State and of the parties require that the validity of the claim and any issue actually litigated in the action shall not be litigated again by them."

Such opportunity was afforded Shipping and Transatlantic in the Commission proceeding with reference to Transatlantic's claims in the District Court and there is no occasion to reopen the problem.

C. *Primary Jurisdiction to Test the Validity of the Change in Question was in the Commission, and it was Error to Require or Permit Redetermination in the District Court.*

This doctrine and that of exhaustion of remedies are related in their general basis. In its order of March 11, 1966, the District Court determined that the Commission had initial primary jurisdiction. At that point Shipping was asserting that Terminals had not complied with the Shipping Act, 1916. (A. vol. I, pp. 16-17.) The District Court's order was entirely in accordance with settled practice. The primary jurisdiction of the Commission and its predecessor agencies has been upheld in two leading determinations of this Court. *United States Navigation Co., Inc.* v. *Cunard Steamship Co., Ltd.*, 284 U.S. 474 (1932); *Far East Con-*

ference v. *United States*, 342 U.S. 570 (1952). The District Court properly retained jurisdiction because the District Court had jurisdiction to grant relief after the Commission acted. Compare *Bird* v. *S.S. Fortuna*, 262 F. Supp. 24 (D. Mass. 1966) (case stayed pending resort to Commission to determine validity of tariff exculpatory clause); *E. B. Ackerman Importing Co.* v. *City of Los Angeles*, 61 Cal. 2d 595, 39 Cal. Rptr. 726, 394 P. 2d 566 (1964) (same).

The issue of validity, subject to review in an appropriate Court of Appeals, should ordinarily be determined with finality. In *Far East Conference* v. *United States, supra*, 342 U.S. 570, 577, involving the dual rate system adopted by a conference of carriers, the Court noted: "An order of the Board will be subject to review by a United States Court of Appeals." Thus, in *Federal Maritime Board* v. *Isbrandtsen Co., Inc.*, 356 U.S. 481 (1958), the acts of the conference complained of were first reviewed in the Federal Maritime Board and then in the Court of Appeals for the District of Columbia Circuit. There was no tampering with the concept of primary jurisdiction and there was no collateral attack on the Board's determination, even though on direct review the Board's ruling was set aside.

Where the Commission had primary jurisdiction, the referring court—here, the District Court—would have had no jurisdiction to allow a collateral attack. The case is procedurally parallel to *United States* v. *Railway Express Agency, Inc.*, 101 F. Supp. 1008 (D. Del. 1951), in which the Court had stayed the proceedings in an antitrust action pending further action by the Interstate Commerce Commission. The Commission upheld the pooling of traffic and service in question. No appeal was taken from the Interstate Commerce Commission's rulings and findings, and the District Court said at page 1012 that the Commission's orders "may not be attacked in a collateral proceeding," refusing the injunctive relief requested by the Government.

II. Even if the District Court had Jurisdiction to Review the Issues Determined by the Commission, the Court of Appeals Erred by Giving the Commission's Findings No Weight Whatsoever.

The Court of Appeals in its opinion paid no heed whatever to the Commission's experience in dealing with filings under approved § 15 agreements. One would have thought that the Commission, having approved the original Agreement No. 8785 and numerous like agreements, would be well qualified to determine whether or not a tariff filing pursuant to the Agreement was so drastic as to constitute a modification of the Agreement.

Whether such changes in tariffs are modifications or not is the kind of issue that has repeatedly been brought before the Commission and its staff. It is not always self-evident what the answer is. In *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission*, 375 F. 2d 335 (D.C. Cir. 1967), the Court observed, "Of course, we are not unaware that the line between action taken in violation of an approved Section 15 agreement and action constituting a new unfiled Section 15 agreement is seldom a clear and distinct one, and most often such line, if it exists at all, is shrouded by a vast penumbra of doubt. We believe, however, that the Commission is the properly constituted body to scrutinize the conference action and to determine initially upon which side of the line the conference action falls. A Commission determination that the conference action falls within or without the approved agreement must be given due deference by the reviewing court." 375 F. 2d at 339. The Court discussed the duties of the Commission and went on to say: "Because of the difficulties attending precise discernment of the particular nature of each conference action, we believe the Commission should be as liberal as possible, consistent with orderly

administration, in granting a conference the opportunity to demonstrate initially that the subject action is embraced within the existing agreement." 375 F. 2d at 340.

The same Court of Appeals in *North Atlantic Westbound Freight Association* v. *Federal Maritime Commission*, 397 F. 2d 683 (D.C. Cir. 1968), denying an application to stay a Commission order accepting for filing so-called through-intermodal container freight tariffs, pointed out with reference to the conference agreement:

> "The question on the merits is not only how the agreement seems to read to the judges of this court, though that is inescapably involved. Construction of such an agreement involves a question of law but like other questions of law, e. g., interpretation of regulatory statutes, the agency's determination is entitled to weight on judicial reconsideration. Certainly where underlying issues of fact or policy are involved an agency's interpretation of agreements is due judicial respect and deference, *cf.* Great Northern Ry. v. Merchants' Elevator Co., 259 U.S. 285, 42 S. Ct. 477, 66 L. Ed. 943 (1922). Specifically in regard to conference agreements, the Commission is to be given 'reasonable leeway in delineating the scope' of these agreements, Swift & Co. v. FMC, 113 U.S. App. D.C. 117, 121, 306 F. 2d 277, 281 (1962). In addition, the view on the merits taken by the Commission, presumptively guardian of the public interest, had some bearing on another issue for consideration on a stay application, as indicating the direction of the public interest." 397 F. 2d at 685.

(Subsequent proceedings in that case are reported in 404 F. 2d 803 (D.C. Cir. 1968).)

And in *Swift & Co.* v. *Federal Maritime Commission*, 306 F. 2d 277 (D.C. Cir. 1962), the Court pointed out that in addition to the experience of the Federal Maritime

Board in dealing with like agreements, the Board had given, as its successor here in the present case, its approval to the original conference agreement and therefore was in a particularly advantageous position to determine the question. 306 F. 2d at 281:

> "Because the 1958 Agreement is not simply a private contract between private parties, the intent of the parties is only one relevant factor, and the Board not only can, but must, weigh such considerations as the effect of the interpretation on commerce and the public. *Moreover, the agreement existed only because approved by the Board.* The Board must be given considerable leeway in delineating the scope of the agreement and therefore the content of its prior approval." (Our emphasis.)

These views are entirely consistent with the decision in *Volkswagenwerk Aktiengesellshaft* v. *Federal Maritime Commission,* 390 U.S. 261 (1968). The Court there took pains to point out (390 U.S. at 272) that "The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.'" The Court then went on to observe that nevertheless the final construction of a statute is still a matter for the courts. We never challenged this view. It is elementary that the interpretation of an act of Congress in the last analysis is a matter for this Court, and that the deference given to an agency's determinations is a matter of reasonable guidance.

The issue in the present case, however, is the interpretation, not of a statute, but of Agreement No. 8785, which exists only by virtue of the approval by the Federal Mari-

time Commission. The interpretation of an agreement by the agency whose approval made it effective and subject to whose continuing jurisdiction the agreement is administered, should be conclusive unless it is clearly contrary to the statute.

III. The Tariff Change in Question was within the Scope of Agreement No. 8785.

Disregarding any weight that might otherwise be given the Commission's ruling, the terms of Agreement No. 8785 still clearly include the tariff change at issue.

A. *The VW Case did Not Hold Otherwise.*

The case at bar is pretty clearly not within the *ratio decidendi* of the *VW* case because that case related to a wholly unapproved arrangement for assessing charges for payments into a fund. The fund was to be used to soften the impact of technological unemployment. Assessment by measurement rather than weight resulted in a rate for the petitioner's cars which was ten times that for other Pacific cargo. For reasons which are now merely historical in importance, the Commission decided, by a divided vote, that, despite the unequivocal language of § 15, the arrangement was not under that section because the statute applied only where the agreement affected outsiders. 9 F.M.C. at 82-83.

The Court of Appeals for the First Circuit mistook the statements in this Court's opinion in *VW* with reference to the "expansive language" of § 15 and the "extremely narrow view" of the Commission as indicative of a general disapproval of the Commission's practice with reference to filings under approved § 15 agreements (A. vol. I, p. 50). Terminals submit that no such disapproval appears or is implied in *VW*, and that there was no occasion for such in the *VW* litigation. In *VW* it was virtually admitted that the arrangement fell literally within the language of

the statute. Nothing had ever been approved by the Commission. The language of § 15 is indeed "expansive." And the Commission's ruling there was "narrow." The case, moreover, is one of a kind and will not likely reappear.

In the present situation, it is not the expansive language of § 15 that gives any problem. On the contrary, it is the "extremely narrow view" which the Court of Appeals took of Agreement No. 8785.

B. *Changes in Charges under Terminal Tariffs are Historically Warranted under Approved Conference Agreements.*

In holding that separate § 15 approval of the tariff change was not required, the Commission observed (10 F.M.C. at 413-414; A. vol. II, p. 56):

> "Approval of Agreement No. 8785, the basic agreement under which the terminals operate, assumed that the various costs of providing terminal services would be allocated as between users of those services. The authority granted under the agreement to jointly fix charges carried with it the continued authority to properly allocate those charges, and while a particular charge in allocation may be an unreasonable practice under section 17 or unlawful under section 16 or some other section of the Act, it does not constitute a new agreement or a modification to the existing agreement calling for a new anti-competitive, monopolistic or rate-fixing scheme not contemplated in the original agreement."

This statement is based on the settled and sound experience of the Commission and its predecessor agencies in administering the Act, initially in the case of conferences of

ocean carriers, *Section 15 Inquiry*, 1 U.S.S.B. 121 (1927), and more recently in dealing with marine terminal operators.

The United States Maritime Commission suggested substantially the procedure now followed by terminal conferences in *Transportation of Lumber Through the Panama Canal*, 2 U.S.M.C. 143 (1939). The Commission was dealing there with charges of both carriers and terminal operators on intercoastal lumber transport. It noted (2 U.S.M.C. at 148) that the proceeding was "the first major proceeding involving the services, charges, and practices of terminal operators;" that jurisdiction arose from the definition of "other person" in § 1 of the Act; that "other persons" were required by § 15 to file, and obtain approval of, agreements on rates, etc., and that §§ 16 and 17 prohibited undue preferences and required just and reasonable practices.

After holding that failure of some of the terminal respondents to publish their rates and charges was unjust and unreasonable and was "conducive to undue preference and practice" (2 U.S.M.C. at 149), the Commission stated: "We will not at this time prescribe for terminal operators a detailed system of rules and regulations governing the publication of their tariffs. For the present we suggest that self-regulation through the medium of section 15 agreements approved by us is a much simpler and more satisfactory solution of the problem. A cooperative working arrangement among the terminals, designed to bring about a stable terminal rate structure for the handling of intercoastal lumber, would not only promote the orderly transportation and marketing of lumber, but would foster fair and regulated competition among the terminals themselves. Such an agreement should embody, among other things, the principles set forth in finding (5) hereinafter made" (2 U.S.M.C. at 150). Finding (5) referred to was

as follows: "5. That when respondent terminals undertake the duty of delivering intercoastal lumber and establish the charges, rules, and regulations in connection therewith, said respondents should publish and post a tariff containing said charges, rules, and regulations, and should not make any changes in said tariff except upon thirty (30) days' notice."

Occasionally the procedure under terminal conference agreements came before the Federal Maritime Board and Commission, in disputed adjudicatory proceedings, although one may suppose that the vast majority of filings went unopposed.

In *Empire State Highway Association, Inc.* v. *American Export Lines,* 5 F.M.B. 565 (1959), objecting truckers argued that the issuance of Tariffs Nos. 3 and 4 under a § 15 agreement among pier operators constituted new agreements or modifications thereof which required specific approval under § 15 before being made effective. The nature of the changes in *Empire State* was extensive and not merely limited to the level of rates. In fact, the complainants' argument was that Tariffs Nos. 3 and 4 "not only set forth the rates and charges, but define the nature of the terminals' obligations, adopt rules with respect to their liability, describe the conditions under which others might load and unload trucks, and generally set forth the manner and method by which trucks may be loaded and unloaded" (5 F.M.B. at 585). The Board held:

> "We agree with the examiner and find that the tariffs are not modifications of the basic agreement or new agreements, within the meaning of section 15. The issuance of tariffs, including rates, charges, rules, and regulations covering the application of the tariffs, were authorized and contemplated by the approved basic agreement."

Significantly, the Board went on in that proceeding to inquire into the issue of whether Tariffs Nos. 3 and 4 and the rates, rules, or regulations contained in the tariffs might operate in such a manner as to be unjustly discriminatory or unfair, detrimental to commerce, or violative of the Act. 5 F.M.B. at 587 *ff.* Thus, the circumstance that those tariffs could be filed without prior approval, not being modifications of the original § 15 conference agreement, in no way barred the agency from investigating and holding hearings on the propriety of the rates and practices in the light of the public interest.

The case bearing the same title in the Court of Appeals for the District of Columbia Circuit was not actually on review of the proceeding to which we have just referred, but it involved the same parties and the same factual background.

In *Empire State Highway Transportation Association, Inc.* v. *Federal Maritime Board,* 291 F. 2d 336 (D.C. Cir. 1961), cert. den. 368 U.S. 931, in holding on a petition for review that the Federal Maritime Board correctly ruled that tariff increases and changes in regulations embodied in a Tariff No. 5 did not constitute a new § 15 agreement or modification under Agreement No. 8005, the Court approved the language quoted above from 5 F.M.B., observing (291 F. 2d at 339):

> "Thousands of rate changes have been agreed upon in concert by conference members in the maritime and related industries under the authority of approved conference agreements, and we are cited to no instance in which conventional rate changes have been held by Board or court to be unlawful because unaccompanied by prior Board approval."

In *Agreement No. 9025: Middle Atlantic Ports Dockage Agreement,* 8 F.M.C. 381 (1965), the examiner had concluded that, despite the Commission's having approved the terminals' conference agreement, which authorized discussion of and agreement on rates, charges and practices, the fruits of these discussions would have to be not only filed with but also approved by the Commission under § 15. He may have reasoned, correctly, that the exception in § 15 for tariff filings under approved conference agreements, added by the 1961 amendment of § 15, P. L. 87-346, 75 Stat. 764 (1961), was applicable only to carriers filing under § 18 (b).* The Commission at any rate overruled the examiner and stated:

> "Since the provisions of section 18(b) referred to above [*i.e.,* in section 15, which the Commission had quoted at length] require the filing of tariffs only by carriers or conference of carriers, it might be said that the exception to the filing requirements under section 15 refers only to the rates, charges, etc., of approved conferences of common carriers. However, we see no reason to apply a stricter standard and additional requirements for a conference of terminal operators than the statute provides for a conference of common carriers. In this connection see *Empire State Highway Transportation Association* v. *Federal Maritime Board,* 291 F. 2d 336 (D.C. Cir. 1961), where the court of appeals held that certain tariff revisions arrived at by a conference of terminal operators, pursuant to an agreement approved under section 15 by our predecessor the Federal Maritime Board, need not be approved by the Board before becoming effective. . . .

* It may be noted that the Court below, A. vol. I, p. 51, n. 4, mentioned the 1961 amendment, which indeed could not have been relied on either by the Commission or by Terminals in view of its limitation to carrier conferences.

"Since Agreement 9025 does not itself impose any charges, it is impossible on this record to assess its effect on carriers, ports, and the commerce of the United States with any real degree of accuracy. The Commission's power over section 15 agreements, however, consists not only of initial approval, but of continuing supervision; and if at some time in the future, rates, charges, classifications, rules or regulations are established pursuant to the agreement which violate the fair and reasonable standards of the Act the Commission may protect the public interest by withdrawing its approval of the basic agreement itself, or by requiring its modification. *Empire State Highway Transportation Association* v. *Federal Maritime Board, supra* . . ." (8 F.M.C. at 384 and 386.)

That such remedies are adequate was already known to the Commission by reason of such proceedings as *Terminal Rate Increases—Puget Sound Ports,* 3 U.S.M.C. 21 (1948), which considered questions of who should be charged, as well as rates, and yet in which no question of § 15 applying to any tariff as a "modification" of a conference agreement was raised. See also *Intercoastal Steamship Freight Association* v. *Northwest Marine Terminals Association,* 4 F.M.B. 387 (1953), appeal dismissed on ground of lateness sub nom. *Northwest Marine Terminal Association* v. *Federal Maritime Board,* 218 F. 2d 815 (9th Cir. 1955).

Indeed, in *Terminal Rate Structure—Pacific Northwest Ports,* 5 F.M.B. 326 (1957), modifying 5 F.M.B. 53, in which the Federal Maritime Board told the Northwest Marine Terminals Association that, notwithstanding the Freas formula, "in every case the terminal operator may bill and collect from the vessel, and in instances where the charges

are incurred for the benefit of the cargo the carrier shall bill and collect such charges from the shipper or consignee." It is surely implicit in that holding that that Association was not required, in order to publish tariffs in the manner suggested by the Board, to return to the Board for an approved modification of its conference agreement.

In *Persian Gulf Outward Freight Conference*, 10 F.M.C. 61 (1966), affirmed sub nom. *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission*, 375 F. 2d 335 (D.C. Cir. 1967), the Commission restated the types of conference action that would require separate presentation and approval under § 15, referring to five separate bases for such a requirement (10 F.M.C. at 65):

> "Separate section 15 approval has been required by the Commission and its predecessors of the arrangements (1) introducing an entirely new scheme of rate combination and discrimination not embodied in the basic agreement (the dual rate contract); (2) representing a new course of conduct (prohibition of brokerage on a particular shipment); (3) providing new means of regulating and controlling competition (port equalization system); (4) not limited to the pure regulation of intraconference competition; or (5) constituting an activity the nature and manner of effectuation of which cannot be ascertained by a mere reading of the basic agreement."

The Commission decided another case involving Agreement No. 8785 in *Boston Shipping Association* v. *Port of Boston*, 11 F.M.C. 1, F.M.C. Docket No. 66-35 (1967). A tariff change transferring "Wharfage" as a charge to cargo to a charge against the vessel was held not to be a modification of Agreement No. 8785. The Commission pointed out that the issuance of the item in question was

"merely in implementation of the general ratemaking authority provided in the basic agreement." 11 F.M.C. at 5-6.

The foregoing case development culminates in two regulations of the Commission: 46 C.F.R. part 537, generally regulating conference agreement provisions relating to concerted activities; and 46 C.F.R. part 533, regulating filing of tariffs by terminal operators. The former of these regulations, adopted in 1966, requires proposed conference agreements to provide methods of record keeping and minute taking of conferences. The latter, adopted in 1965, requires terminal operators to file their tariffs with the Commission with terms as defined in § 533.6(d) to the extent applicable. Other definitions may be used if they are correlated to the definitions set forth. Services other than those defined by § 533.6(d) may be listed and charged for in terminal tariffs pursuant to § 533.6(a).

C. *A Change of Incidence in a Charge does Not Require Separate Approval as a Modification of the Conference Agreement.*

In the *Persian Gulf* case, *supra*, there appears a breakdown of the kinds of conference action which require an approved modification. See also *Continental Nut Co.* v. *Pacific Coast River Plate Conference*, 9 F.M.C. 563 (1966). Application of the tests, reiterated by the Commission in *Persian Gulf Outward Freight Conference*, 10 F.M.C. 61, 65 (1966), in conjunction with the examples used by the Commission, shows that the tariff change here involved was not of the type which requires § 15 approval.

(1) Unlike a dual rate contract, it does not introduce a new scheme of rate combination and discrimination. No rates are combined; no one is discriminated against.

(2) The changing of the identity of the person billed does not represent a new course of conduct, not contemplated by the original approved agreement, unlike prohibition of brokerage on a particular shipment. Strike demurrage has always been assessed in the Port and continues to be assessed. Various charges such as dockage, also reckoned on the weight of cargo, have always been assessed to the vessel. Agreement No. 8785 specifically contemplates changes in the tariff.

(3) In complete contrast to a port equalization system, which contemplates absorption of the difference of inland shipping costs to a loading port more remote from the shipper's plant than nearby ports, the change in our case does not provide new means of regulating and controlling competition.

(4) The uniform tariff in which the present demurrage charge is incorporated does not control competition outside the Terminal Association. This is in contrast to port equalization, which affects third party interests such as the ports and facilities from which traffic is drawn away.

(5) There is no activity which cannot be ascertained from the basic agreement, which comprehensively covers wharf demurrage, usage charges, wharfage, dockage, and all services, facilities, rates and charges incidental thereto.

Of course the tests are to be used with respect to particular fact situations. All revisions of tariffs (other than mere clarifications) represent something "new" in some sense and will have some economic effect. The test is whether the change could be said to be within the bounds of the original agreement. Here, plainly it is. The revision, reducing the rate and assessing the charge to the

vessel along with dockage, results in a more equitable distribution of the burden during longshoremen's strikes. The change is obviously not radical. It lacks the aroma of discrimination and favoritism present in all the arrangements which the Commission has held to require § 15 approval.

This breakdown of items is self-explanatory because in each instance the Commission has by footnote referred to the specific problem that put the situation outside the original scope. They are all more or less directed to the point that, where the approved conference agreement fails to provide effectually for the course of conduct in question, the issuance of the tariff constitutes a modification or enlargement of the original conference agreement which itself must, under § 15, be approved by the Commission.

The Court below (420 F. 2d, at 422; A. vol. I, p. 50) suggested that "Administrative standards cannot be established ex post facto," but the standards in question in this particular area have long been established and, it is hoped, will continue to be clarified in the manner most familiar to our jurisprudence, case-by-case determination. There is no need to fear inconsistency of policy on this question; "if the work has been properly done, there will not be cases looking east and west on similar facts, although, as with the courts, there may be some looking north-northeast or north-northwest as well as due north." Friendly, Definition of Administrative Standards, 75 Harv. L. Rev. 1263, 1295 (1962). Accord, *Federal Maritime Board* v. *Isbrandtsen Co., Inc.*, 356 U.S. 481, 500 (1958), where the Court noted that it was "by no means clear that the Board and its predecessors have taken uniform and consistent positions in regard to the validity of dual-rate systems under § 14 Third."

In cases such as *Trans-Pacific Freight Conference of Japan* v. *Federal Maritime Commission*, 314 F. 2d 928 (9th Cir. 1963), *American Export & Isbrandtsen Lines* v. *Federal Maritime Commission*, 334 F. 2d 185 (9th Cir. 1964), and *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission*, 375 F. 2d 335 (D.C. Cir. 1967), the courts of appeals examined the conference agreements in question to determine whether or not the action taken constituted a modification.

The provisions of Agreement No. 8785 upon like examination will be found to authorize the kind of rate-fixing in issue here. Agreement No. 8785 recites broadly that it is an agreement "by and among the Marine Terminal Operators of the Port of Boston, Massachusetts relative to rates of and charges by the parties for furnishing wharfage, dock, and other terminal facilities . . ." (A. vol. II, p. 5). By Article Third, it covers "the following subject matters and all services, facilities, rates, and charges incidental thereto:—wharfage, dockage, free time, wharf demurrage, usage charges, passenger charges, water, electricity" (A. vol. II, p. 6). Article Sixth provides a method of dealing with such matters and further provides for publication and advance notice and filing with the Commission of changes in tariffs (A. vol. II, pp. 7-8).

There is nothing in these provisions to restrict the incidence of the charges under tariffs to that in force at the time of the issuance of the first tariff. On the contrary, the incidence of a charge, like the rate, is left open to future determination.

In the courts below, Transatlantic argued that "wharf demurrage," which is somewhat similar to the strike storage charge here under attack, has generally been considered a charge against the cargo, and that, therefore, a change in its incidence is not "routine" within the language of some of the decisions on the scope of § 15 agree-

ments. The word "routine," however, applies to the character of the change, not to its economic conformity to past practice. The truckloading rates and regulations in *Empire State, supra,* pp. 36-37, were of considerable novelty on the New York piers and engendered as much litigation as the present strike storage charge. Yet the issuance of the tariff itself was "routine" because it was the kind of action contemplated by the approved conference agreement.

Certainly there would be no public advantage in a "narrow interpretation" of the "expansive language" of a terminal conference agreement like Agreement No. 8785. Upon publication of a tariff change under such an agreement, Shipping and any other interested party could file a complaint with the Commission, as in fact they did. Reparations could have been ordered by the Commission if charges had been collected and discrimination or unjust practices had been found under §§ 16 or 17 of the Act. The Commission on its own motion could investigate and enter appropriate orders. In fact, if it found Agreement No. 8785 was being misused, it could revoke its approval of the Agreement.

Moreover, the term "demurrage" in fact does not have the narrow meaning which Transatlantic seeks to impose. Under the Freas formula, demurrage like any other charge should run against the party who is benefitted by the service in question. The present charge, which contains no penal element, is incurred for the benefit of the vessel, since tender of delivery is not complete in the Port of Boston on inbound merchandise until at least the expiration of free time. There is no reason at law or in equity why the charge should not be made against the vessel rather than the cargo owner who cannot remove the goods from the pier.

The Commission itself obviously does not subscribe to the view that demurrage can only be assessed against cargo interests. In the recent decision in *Free Time and Demurrage Charges on Export Cargo*, Docket 68-9, Mimeograph, p. 37 (April 9, 1970), partially printed in 38 U.S. L. W. 2587, the Commission ruled that in the Ports of New York and Philadelphia demurrage on export cargo in the case of cancellation of sailings should be assessed against the vessel rather than against cargo interests.*

Conclusion.

The issues raised in this case test the strength of the rulings of the Federal Maritime Commission and affect the conduct of all commerce carried on under F.M.C.-approved agreements. Transatlantic's challenge to the F.M.C.'s decision and to charges made under Agreement No. 8785 amounts to an attack upon long settled principles of administrative law and statutory interpretation.

The District Court correctly and succinctly applied the relevant law to the circumstances. Its opinion preserved the doctrines of administrative finality and, furthermore, correctly ruled that the F.M.C. decision accorded with a proper determination of the substantive questions. The Court of Appeals, however, rejected the F.M.C. decision and misapplied the *VW* case. In doing so, that Court erred.

* The Commission also noted (Mimeograph at p. 32) that in a port like New Orleans, where the carrier in effect leases the pier from the pier operator, demurrage on export cargo is always assessed against the vessel. In that port, the carrier is permitted to pass the charge on to the shipper. "In such cases the vessel is in a real sense responsible for the demurrage, and it does not appear inappropriate for the port to assess it against the vessel."

The appellants, therefore, ask that this Court enter an order reversing the judgment of the Court of Appeals for the First Circuit, and remand the case to that Court with directions to affirm the order of the District Court.

Respectfully submitted,

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